ABT Construction Sdn Bhd & Anor v Tribunal Tuntutan Pembeli Rumah & Ors

HIGH COURT (PULAU PINANG) — APPLICATION FOR JUDICIAL REVIEW NO 25–10–01 OF 2012
VARGHESE GEORGE J
21 DECEMBER 2012

Administrative Law — Exercise of judicial functions — Judicial review — Jurisdiction of Tribunal for Homebuyer Claims ('tribunal') — Whether tribunal had jurisdiction to adjudicate on homebuyers' claim when applicants against whom claim was brought were not 'licensed housing developers' — Whether tribunal had erred or acted irrationally when it concluded that applicants were collectively a 'housing developer' — Whether decision of tribunal to seize jurisdiction and deal with purchasers' claim was tainted with illegality or procedural impropriety — Whether activities undertaken by applicants were within definition of 'housing development' as defined in Housing Development (Control and Licensing) Act 1966 ('Act') — Whether tribunal could be faulted for its decision to replace terms of SPA with contractual terms found in Schedule G of the Housing Development (Control and Licensing) Regulations 1989 ('Regulations') — Whether decision and award of tribunal was tainted by any illegality, irrationality or procedural impropriety to merit curial intervention

Statutory Interpretation — Construction of statutes — Purposive approach — Legislative intent behind provisions of Housing Development (Control and Licensing) Act 1966 ('Act') — Whether phrase 'licensed housing developer' ought to be interpreted harmoniously with wider objectives of the Act to include such persons and entities who were required to be licensed under the Act but had failed to do so

The first applicant contractor and the second applicant vendor ('the applicants') had entered into a sale and purchase agreement ('the SPA') with the respondent purchasers ('the respondents') for the sale, construction and disposal jointly by the applicants of a completed bungalow on a piece of land in Kedah, which was owned by the second applicant vendor. The respondents had made a claim for late delivery of the completed bungalows. The applicants had counterclaimed to recover the interest accrued on late settlement of progress payments by the respondents. The claim was heard by the Tribunal for Homebuyer Claims ('the tribunal'), a tribunal that was established under the Housing Development (Control and Licensing) Act 1966 ('the Act') to deal specifically with claims lodged by a homebuyer. The President of the tribunal had allowed the respondents' claim. In computing the sum awarded to the respondents, the tribunal had set-off the counterclaim. The applicants had also

entered into 21 other identical SPAs with other purchasers of similar to be built bungalows ('the other purchasers'). The other purchasers had made similar claims, which the tribunal had also allowed. The applicants filed the present application under O 53 of the RHC 1980 to quash the decision of the tribunal in the present case and in the 21 other cases, which were similarly decided. However, by agreement of all the parties, the instant application was treated as the test case with the outcome of the present test case to be applicable to the other 21 cases as well. The applicants argued that pursuant to s 16N(2) of the Act, the tribunal could only adjudicate on a homebuyer's claim if the party against whom the claim was brought was a 'licensed housing developer'. The applicants thus submitted that as they were not licensed housing developers, the tribunal had no authority or power to deal with the purchasers' claim under the SPA. It was therefore the applicants' contention that the tribunal had acted in excess of its jurisdiction. The applicants further submitted that the tribunal by replacing the terms of the SPA with the contractual terms as found in Schedule G of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations') had in effect rewritten the terms of the SPA, which had been freely concluded by the parties. The tribunal submitted that as the respondents' claim had been filed within the 12 months of the expiry of the defects' liability period it was in compliance with s 16N(2) of the Act to confer jurisdiction on the tribunal to adjudicate the claim. The tribunal further submitted that it was settled law that whenever the terms in a SPA were inconsistent with the Schedule G clauses that the Schedule G clauses would prevail.

Held, dismissing application with costs:

(1) Based on the facts as a whole it was clear that the activity as evidenced by the terms of the SPA, which was undertaken by the applicants, involved the sale of more than four units of 'housing accommodation' and was therefore clearly within the definition of 'housing development' as defined in the Act. Further, the fact that the 'housing accommodation' were being constructed at separate times, ie four at a time, was irrelevant and a non-issue for the purposes of the definition (see para 23).

(2) Although the applicants chose to refer to themselves as 'the Contractor' and 'the Vendor' in the SPA, this did not detract from the legal effect that they were indeed a 'housing developer' under and for the purposes of the Act. The President of the tribunal was therefore not in error or any way irrational when he concluded that the applicants were collectively a 'housing developer' in respect of the SPA with the purchasers (see para 24).

(3) The legislative intent behind the various provisions of the Act, including the setting up of the tribunal, was to regulate in an orderly manner the business of housing development and to protect the interests of

purchasers of housing accommodation. Although s 16N(2) of the Act provided that the tribunal's jurisdiction was limited to only hearing claims between a homebuyer and a 'licensed housing developer', the phrase 'licensed housing developer' ought to be interpreted harmoniously with the wider objectives and legislative intent behind the provisions of the Act to include such persons and entities who were required to be licensed under the Act to undertake housing development but had failed or neglected to do so. Such failure or neglect to apply for and be licensed should not be accepted as a legitimate route to escape from the purview of the tribunal. The extent of the tribunal's powers and jurisdiction was intertwined with the objects and provisions of the Act. Thus the decision of the President of the tribunal to seize jurisdiction and deal with the purchasers' claim was not tainted with illegality or procedural impropriety (see paras 17 & 27).

(4) The 'delivery of vacant possession' clause in the SPA was in direct contravention with the Schedule G clause in the Regulations. The applicants could not and ought not to be allowed to contract out or circumvent that Schedule G clause. As such, the tribunal could not be faulted for its decision to replace the terms of the SPA with the contractual terms as found in Schedule G of the Regulations (see para 36).

(5) In the circumstances, the decision and award of the tribunal was not tainted by any illegality, irrationality or procedural impropriety to merit curial intervention (see para 39).

[Bahasa Malaysia summary

Pemohon pertama kontraktor dan pemohon kedua vendor ('pemohon-pemohon') telah memeterai perjanjian jual beli ('PJB') dengan responden-responden pembeli ('responden-responden) untuk penjualan, pembinaan dan pelupusan bersama oleh pemohon-pemohon bagi sebuah banglo siap di atas sebidang tanah di Kedah, yang dimiliki oleh pemohon kedua penjual. Responden-responden telah membuat tuntutan bagi penghantaran lewat banglo-banglo yang telah siap. Pemohon-pemohon telah menuntut balas untuk mendapatkan semula faedah terakru bagi penyelesaian lewat bayaran berkala oleh responden-responden. Tuntutan tersebut dibicarakan oleh Tribunal Tuntutan Pembeli Rumah ('tribunal'), sebuah tribunal yang ditubuhkan di bawah Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta') yang khusus bagi menangani tuntutan yang dibuat oleh pembeli rumah. Presiden tribunal telah membenarkan tuntutan responden-responden. Dalam mengira jumlah wang yang diawardkan kepada responden-responden, tribunal telah menolak tuntutan balas tersebut. Pemohon-pemohon juga telah memeterai 21 lagi PJB yang sama dengan lain-lain pembeli-pembeli banglo sama yang akan dibina ('pembeli-pembeli lain'). Pembeli-pembeli lain telah membuat tuntutan yang sama, yang mana

turut dibenarkan oleh tribunal. Pemohon memfailkan permohonan ini di bawah A 53 KMT 1980 untuk membatalkan keputusan tribunal dalam kes ini dan dalam 21 kes lain, yang diputuskan dengan sama. Walau bagaimanapun, dengan persetujuan semua pihak, permohonan ini dianggap sebagai kes ujian yang mana keputusan kes ujian ini juga terpakai kepada 21 kes lain. Pemohon-pemohon menghujahkan bahawa menurut s 16N(2) Akta, tribunal hanya boleh mengadili tuntutan pembeli rumah jika pihak yang mana terhadapnya tuntutan tersebut dibuat merupakan pemaju perumahan berlesen. Pemohon-pemohon dengan itu menghujahkan bahawa oleh kerana mereka tidak mempunyai lesen pemaju perumahan, tribunal tidak mempunyai kuasa untuk berurusan dengan tuntutan pembeli-pembeli di bawah PJB. Oleh itu, adalah dihujahkan oleh pemohon-pemohon bahawa tribunal telah bertindak melebihi bidang kuasanya. Pemohon-pemohon seterusnya menghujahkan bahawa tribunal, dengan menggantikan syarat-syarat PJB dengan terma-terma kontrak seperti yang terdapat dalam Jadual G Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 (Peraturan-Peraturan) telah dengan kuat kuasa, merangka semula terma-terma PJB, yang telah disimpulkan dengan bebas oleh pihak-pihak. Tribunal menghujahkan bahawa oleh kerana tuntutan responden-responden telah difailkan dalam tempoh 12 bulan dari tarikh tamat tempoh liabiliti kecacatan, ia mematuhi s 16N(2) Akta untuk memberi bidang kuasa kepada tribunal mengadili tuntutan. Tribunal menghujahkan bahawa adalah matan apabila terma-terma dalam PJB tidak konsisten dengan klausa-klausa Jadual G, klausa-klausa Jadual G akan diterima pakai.

Diputuskan, menolak permohonan dengan kos:

(1) Berdasarkan keseluruhan fakta, adalah jelas bahawa aktiviti seperti yang dibuktikan oleh terma-terma PJB, yang telah diakujanji oleh pemohon-pemohon, melibatkan penjualan lebih daripada empat unit 'tempat tinggal' dan oleh itu dengan jelas merupakan takrif 'pembangunan perumahan' sebagaimana yang ditakrifkan dalam Akta tersebut. Tambahan lagi, fakta bahawa 'tempat tinggal' sedang dibina pada masa-masa yang berasingan, iaitu empat pada satu masa, adalah tidak relevan dan bukan isu bagi maksud takrif (lihat perenggan 23).

(2) Walaupun pemohon memilih untuk merujuk diri mereka sebagai 'kontraktor' dan 'penjual' dalam PJB, ini tidak mengurangkan kesan undang-undang bahawa mereka sememangnya 'pemaju perumahan' di bawah dan bagi maksud Akta. Oleh itu, Presiden tribunal tidak khilaf atau dalam apa jua cara tidak rasional dalam memutuskan bahawa pemohon-pemohon adalah secara kolektifnya 'pemaju perumahan' bagi PJB dengan pembeli-pembeli (lihat perenggan 24).

(3) Niat perundangan di sebalik pelbagai peruntukan-peruntukan Akta, termasuk penubuhan tribunal, adalah untuk mengawal selia perniagaan

pemajuan perumahan secara teratur dan untuk melindungi kepentingan pembeli rumah. Walaupun s 16N(2) Akta memperuntukkan bahawa bidang kuasa tribunal adalah terhad kepada hanya mendengar tuntutan antara pembeli rumah dan 'pemaju perumahan berlesen', frasa 'pemaju perumahan berlesen' harus ditafsirkan secara harmoni dengan objektif yang lebih luas dan niat perundangan di sebalik peruntukan-peruntukan Akta untuk memasukkan orang dan entiti yang perlu dilesenkan di bawah Akta untuk melaksanakan pembangunan perumahan tetapi telah gagal atau cuai berbuat demikian. Kegagalan atau kecuaian untuk memohon dan dilesenkan tidak boleh diterima sebagai cara yang sah untuk mengelak bidang kuasa tribunal. Takat kuasa dan bidang kuasa tribunal berkait rapat dengan matlamat dan peruntukan-peruntukan Akta. Oleh itu, keputusan Presiden tribunal untuk menjalankan bidang kuasa dan berurusan dengan tuntutan pembeli tidak dicemari dengan ketaksahan undang-undang atau salah laku prosedur (lihat perenggan 17 & 27).

(4) Fasal 'penyerahan milikan kosong' dalam PJB secara langsung melanggar klausa Jadual G dalam Peraturan-peraturan. Pemohon tidak boleh dan tidak sepatutnya dibenarkan untuk menarik kontrak atau memintas klausa Jadual G. Oleh itu, tribunal tidak boleh disalahkan atas keputusannya untuk menggantikan terma-terma PJB dengan terma-terma kontrak seperti yang terdapat dalam Jadual G Peraturan-Peraturan (lihat perenggan 36).

(5) Dalam hal keadaan ini, keputusan dan award tribunal tidak dicemari dengan sebarang ketaksahan, ketakrasionalan atau ketidakwajaran prosedur untuk mewajarkan campur tangan mahkamah (lihat perenggan 39).]

Notes

For cases on judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 186–204.

For cases on purposive approach, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1900–1967.

Cases referred to

Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia [2003] 1 MLJ 1; [2002] 4 CLJ 689, CA (refd)

Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd and another apeal [2013] 2 MLJ 361; [2011] 4 CLJ 42, FC (refd)

Lim Chon Jet @ Lim Chon Jat & Ors v Yusen Jaya Sdn Bhd [2011] 5 MLJ 239; [2011] 8 CLJ 598, HC (refd)

Nothman v Barnet London Borough Council [1978] I WLR 220, CA (refd)

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, HL (refd)

R Rama Chandran v The Industrial Court of Malaya & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31; [1982] CLJ 355, FC (refd)

Sheila a/p Sangar v Proton Edar Sdn Bhd & Anor [2009] 4 MLJ 285; [2009] 8 CLJ 200, HC (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

Tan & Tan Development Sdn Bhd v Pendakwa Raya [1993] MLJU 496; [1994] 4 CLJ 74, HC (refd)

Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor [2007] 1 MLJ 626; [2007] 1 CLJ 300, HC (refd)

Legislation referred to

Contracts Act 1950

Interpretation Acts 1948 and 1967 s 17A

Housing Development (Control and Licensing) Act 1966 ss 3, 5, 16A, 16M, 16N(2), (2)(b), 16L, 18

Housing Development (Control and Licensing) Regulations 1989 Schedule G, Form, cll 7, 23, 23(1), 25, 26

Legal Profession Act 1976 s 13(1)

Rules of the High Court 1980 O 53

Lim Kean Mui (Wong Mei Wei Melissa with her) (Sunny Khoo & Company) for the appellants.

Zaharuddin Md Isa (Federal Counsel, State Legal Advisor Offices) for the first respondent.

Murshida (Chew Ju Li & Co) for the second and third respondent.

Varghese George J:

INTRODUCTION/BACKGROUND

[1] This was an application brought under O 53 of the Rules of High Court 1980 ('RHC 1980') to quash the award or decision of the President of the Tribunal for Homebuyer Claims ('tribunal') dated 19 December 2011. At the tribunal proceedings, the applicants were the respondents cited in a claim filed by Mohd Fauzi bin Abdul Latif and Zainab bt Ismail in respect of or arising from a 'sale and purchase agreement' dated 17 August 2004 ('the SPA').

[2] The first applicant was a party to the SPA and was referred in the SPA as ('the contractor'). The second applicant was also a party to SPA and referred to there as the 'the vendor'.

For convenience, both the applicants will be collectively referred to in this grounds of decision as 'the contractor/the vendor'.

[3] Mohd Fauzi bin Abdul Latif and Zainab bt Ismail were in the SPA jointly referred as 'the purchaser' and that description will be adopted to refer to them in this grounds of decision.

[4] The heading of the SPA was in the following terms: SALE AND PURCHASE AGREEMENT (LAND AND BUILDING). It could be surmised from even a cursory perusal of the contents of the SPA that the pith and substance of the SPA was the sale, construction and disposal jointly by the contractor/the vendor of a completed bungalow on subdivided Plot No 95 on titled land HS (M) 410 PT 543, Mukim Jawi District of Pokok Sena, Kedah ('the bungalow'). The total 'build-up' area of the bungalow as per the drawings attached to the SPA was to be 1,322 sqft.

[5] The tribunal had allowed the purchaser's claim for late delivery of the completed bungalow and in computing the sum awarded to the purchaser, the tribunal had also set off the counterclaim filed by the contractor/the vendor to recover the agreed interest accrued on late settlement of progress payments by the purchaser.

[6] There were 21 other similar applications for judicial review of the tribunal's decision which had been filed by the contractor/the vendor (as set out in the schedule to this grounds of decision). They were in respect of identical sale and purchase agreements entered into with other purchasers of similar to be built properties in what had been described as 'Taman Bunga Sena' within a project further described as 'Pusat Komercial Pokok Sena', Alor Setar, Kedah (see exh LCS5 (*lampiran* T) in encl 2 and exh MFAL3 and MFAL4 in encl 8).

The respective purchasers pursuant to the said 21 other sale and purchase agreements had similarly filed claims against the contractor/the vendor and the tribunal had dealt with them together and allowed those claims as per the terms of the one award of tribunal issued for all those case. The calculation of the amounts due (after set off for counterclaim) in each case was separately derived and ordered by the tribunal to be paid by the contractor/the vendor.

[7] As the principal issues raised in all the judicial review applications by the contractor/the vendor were similar, by agreement of all parties, this instant application was prosecuted as the main or test-case and it was agreed that the outcome here would be accepted and be applicable in respect of the other 21

cases as well.

THE COMPLAINT OF THE CONTRACTOR/THE VENDOR

[8] The contractor/the vendor's attack against the tribunal's award were essentially two-pronged.

The principle contention was that the tribunal had acted in excess of its jurisdiction when it entertained and dealt with the purchaser's claim. This, it was argued, was because the contractor/the vendor was not a 'licensed housing developer' and pursuant to s 16N(2) of the Housing Development (Control and Licensing) Act 1966 ('the HDA'), the tribunal's jurisdiction was limited to only a claim that was based on a cause of action arising from the sale and purchase agreement entered into between a homebuyer and a 'licensed housing developer'.

[9] The subsidiary contention was that the tribunal could not rewrite the terms of the SPA that had been freely concluded as between the parties. The rights and obligations mutually binding on the parties to the SPA had to be determined as a contract governed by the Contracts Act 1950 and ought not to be replaced or superimposed with the contractual terms as found in Schedule G of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations').

[10] It was not in dispute that the contractor/the vendor were not a 'licensed housing developer'. It was obvious however that the omission to apply for and obtain a license pursuant to s 5 of the HDA by the contractor/the vendor (separately or jointly) was a willful one at that. The contractor/vendor's stance was that the SPA provided separately for the contractor to undertake the construction of the bungalow and for the vendor to transfer that portion of the land on which the bungalow was to be constructed. It was also contended that the envisaged construction was only for four units of bungalows at any one time. For these reasons, it was submitted that the contractor/the vendor were not caught within the definition of 'housing developer' or 'housing development' in the HDA.

Counsel for the applicant even suggested that the 'licensed housing developer' for the Taman Bunga Sena residential buildings was some other, namely, one ABT Jaya Holdings Sdn Bhd.

NOT HOUSING DEVELOPER — THE JURISDICTION ISSUE

[11] It need to be pointed out that the tribunal was establish by amendments introduced to the HDA by Act A1142 of Part VI (Tribunal for Homebuver Claims) and this came into force on 1 December 2002. Section 16N(2) of the

Housing Development (Control and Licensing) Act 1966, that was material for our consideration here (as further amended by Act A 1289 (12 April 2007) was in the following terms:

> (2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from a sale and purchase agreement entered into between the homebuyer and *the licensed housing developer* which is brought by a homebuyer not later than twelve months from:-
>
> (a) the date of issuance of the certificate of completion and compliance for the housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later;
>
> (b) the expiry date of the defects liability period as set out in the sale and purchase agreement; or
>
> (c) the date of termination of the sale and purchase agreement by either party and such termination occurred before the date of issuance of the certificate of completion and compliance for the housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later.
>
> (Emphasis added.)

[12] The thrust of the submission by counsel for the contractor/the vendor was that the tribunal could only adjudicate on a homebuyer's claim, if and only if, the party against whom the claim was brought was a 'licensed housing developer'. What in effect was being urged upon the court was to accord a strict literal reading, to the words 'licensed housing developer' in s 16N(2) of the Housing Development (Control and Licensing) Act 1966 and to hold here that the tribunal had no authority or power to deal with the purchaser's claim under the SPA, since the contractor/vendor was not a licensed housing developer.

[13] The same argument was taken before the President of the tribunal, who in the 'alasan penghakiman' dealt with it and rejected the same in the following terms:

> Sekiranya dilihat daripada perjanjian jual beli bertarikh 1 September 2004 Schedule 2 Reference No 5 — Pelan Tapak, PP1 dan PP2 merancang sesama sendiri untuk membina di atas tapak tersebut lebih daripada empat unit rumah tempat tinggal dan menurut Third Schedule — Payment of purchase price, maka merupakan kumpulan orang yang menjalankan pemajuan perumahan. Justeru PP1 dan PP2 merupakan pemaju perumahan tanpa lesen.
>
> Maka perjanjian jual beli bertarikh 1 September 2004 adalah tertakluk kepada Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966. Walaupun tidak berlesen (yang menjadi kesalahan di bawah Akta), maka tribunal tuntutan pembeli rumah mempunyai bidang kuasa untuk mendengar tuntutan yang dibuat oleh pembeli.

[14] In my assessment, the questions at hand for determination, on the issue of jurisdiction that is, boiled down to two core ones, namely: A

(a) whether the 'activity' as evidenced by the terms of the SPA in so far as it involved the contractor/the vendor was 'housing development' and/or was being undertaken by a 'housing developer', within the meaning of those terms as defined in the HDA; and B

(b) whether a party who was engaged in 'housing development' and who had refused or failed to obtain a license under the HDA, could rely on their 'unlicensed' state to avoid being subjected to tribunal proceeding under Part VI of the HDA. C

Housing development/housing developer

D

[15] Section 3 of the HDA (Interpretation) provide the following definitions, which were pertinent for the consideration here:

(a) 'housing development'

Prior to Act A1289 E

> housing development means to develop or construct or cause to be constructed in any manner more than four units of housing accommodation and includes the collection of monies or the carrying on of any building operations for the propose of effecting housing accommodation in, on, over or under any land; *or the sale of more than four units of housing lots by the landowner or his nominee with the view of constructing more than four units of housing accommodation by the said landowner or his nominee*; F

After Act A 1289 G

> 'housing development' means to develop or construct or cause to be constructed in any manner whatsoever more than four units of housing accommodation and includes the collection of moneys or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; *or the sale of more than four lots of land or building lots with a view of constructing more than four units of housing accommodation*; H

(b) *'housing developer'* I

> 'housing developer' means any person, body of persons company, firm or society *(by whatever name described)*, who or which engages in or carries on or undertake or causes to be undertaken a housing development.

(c) *'housing accommodation'*

Prior to Act A 1289

'housing accommodation' includes any building, tenement or messuage which is wholly or principally constructed, adapted or intended *for human habitation or partly for human habitation* and partly for business premises but does not include an accommodation erected on any land designated for or approved for commercial development.

After Act A 1289

'housing accommodation' includes any building, tenement or messuage *which is wholly or principally constructed adopted or intended for human habitation or partly for human habitation* and partly for business premises and such other type of accommodation as may be prescribed by the Minister from time to time to be a housing accommodation pursuant to section 3A; (Emphasis added.)

[16] Section 5 of the HDA statutorily stipulated that no housing development activity was to be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a license issued under the HDA. It was mandatory for such persons or entities engaged in housing development activity to apply for and secure a license.

Failure to secure a license was an offence (s 18 of the HDA) and upon conviction the offender was liable to be fined (RM250,000–RM500,000) and/or to be imprisoned for a term not exceeding five years. Any director, manager or other official implicated in that offence, likewise upon conviction was liable to improvement (minimum 12 months but not exceeding three years) and to a fine (between RM50,000–RM250,000) to be personally borne.

[17] The severity of the penal sanctions that could be imposed if a 'license' was not applied for and obtained underscored the significance and seriousness behind the objectives of the HDA and its various provisions. As the 'Long Title' to the HDA stated, this statute was '… to provide for the control and licensing of the business of housing development in (Peninsular Malaysia), *the protection of the interest of purchasers* and for matters connected therewith'. (Emphasis added.)

Without a doubt therefore, the legislative intent behind the various provision of the HDA, including the setting up of the tribunal, was to regulate in an orderly manner the business of housing development and to protect the interests of purchasers of housing accommodation.

[18] The questions posed above, namely (but paraphrased further here), whether the contractor/the vendor were undertaking 'housing development'

and whether the interpretation to be given to the terms 'licensed housing developer' should be to even include 'unlicensed' housing developer, had to be considered and answered as against the above recited fundamental aspects of the HDA and the objectives behind that statute.

[19] In the at Interpretation Acts 1948 and 1967 s 17A, the courts in situations like at hand have been enjoined to be guided as follows:

> *17A Regard be had to the purpose of Act.*
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) should be preferred to a construction that would not promote that purpose or object.

The Court of Appeal in *Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2003] 1 MLJ 1; [2002] 4 CLJ 689 (which concerned an interpretation of s 13(1) of the Legal Profession Act 1976 and whether the first appellant was qualified as a master to take on the second appellant as a pupil), speaking through Gopal Sri Ram JCA (as he then was) stated:

> The approach to the interpretation of the Act should be purposive. The purpose of the Act is to protect the public from incompetent members of the legal profession. Once it is accepted that the Act is there to protect the public, a literal interpretation of s 13(1) would defeat the intention of Parliament. Further the modern approach to statutory interpretation is purposive and not literal.

[20] Lord Griffiths in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 (HL), as approved in the above decision of the Court of Appeal, had this to say on the point:

> The days have long passed when the courts adopted a strict constructionists view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach, which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.

[21] Returning then to the first question, whether as per the terms of the SPA, the contractor/the vendor were undertaking on 'housing development' and/or acting as 'housing developer' and whether they were under a statutory obligation to obtain a 'license' for that activity, it was the President of the tribunal's conclusion, with reference in particular to the preamble of the SPA, that the contractor/the vendor were indeed jointly 'housing developer' of the bungalow in question being constructed and sold to the purchaser.

To me, the essential features of a housing development were all encompassed in the terms of the SPA, and these included the following:

- there was a Project land which was to be subdivided into bungalow lots and 'separate lots'
- the Contractor had obtained approval of the Layout Plan from the relevant authorities
- the Contractor and the Vendor were to apply for and obtain approval of building plans of the Bungalow and thereafter construct and complete the Bungalow.
- the Vendor (as owner of the land) was to collaborate with the Contractor in the supervision of the construction and upon issue of a separate document of title to the said lot, to transfer the title to the lot into the name of the Purchaser.
- progressive payments of the agreed purchase price was to follow the completion of the stages of construction of the Bungalow and if the Purchaser defaulted in any payment of the progress payment within 21 days, interest on late payment would be levied which the Purchaser would be liable to pay.

[22] The terms of the SPA, save for three or four clauses, it would also be observed, closely followed the fashion and were identical to the terms of the contract of sale stated in Schedule G of the Regulations (sale and purchase agreement (land and building)). This was conceded to by counsel for the contractor/the vendor when I highlighted the same.

In fact, cl 7 in Schedule G as to 'Purchaser's right to initiate and maintain action in any court of tribunal …' seems to have been reproduced unintentionally perhaps, in toto in cl 6 of the SPA.

[23] There was also no denying the fact that the project being undertaken by the construction/the vendor taken on the whole involved the sale of more than four housing lots (pre-amendment) or building lots (post amendment) with a view of constructing more than four units of 'housing accommodation' and was therefore clearly within the definition of 'housing development' in the HDA (see *Plan Tapak* in the SPA itself: exh LCS3 encl 2).

It did not matter then in my view, whether the 'housing accommodation' were being constructed at separate times, namely only four at a times, as submitted by counsel for the constructor/the vendor. This was irrelevant and a non-issue for purposes of the said definition which they were clearly caught within (*Tan & Tan Development Sdn Bhd v Pendakwa Raya* [1993] MLJU 496; [1994] 4 CLJ 74).

[24] The fact that in the SPA 'the Contractor' and 'the Vendor' chose to refer

to themselves accordingly, did not either detract from the legal effect that both de facto and de jure they were indeed a 'housing developer'. The definition required an examination of the substance of the terms (the rights and obligations) and if the persons or body of persons were engaged in, carrying on or undertaking or causing to be undertaken a housing development, then they were 'housing developer' under and for purposes of the HDA. This was irrespective of how they chose to be called or the name in which they were described in the relevant sale and purchase agreement.

[25] The President of the tribunal, in my judgment, was therefore not in error or in any way irrational when he concluded that the constructor/the vendor was collectively a 'housing developer' in respect of the SPA with the purchaser.

[26] As regards the second question ('licensed housing developer' includes 'unlicensed' housing developer) apart from the overriding principles or guidelines for interpretation of statutory provisions noted and reproduced above, I found it also helpful to have in mind what Lord Denning MR observed in *Nothman v Barnet London Borough Council* [1978] I WLR 220 CA, which was as follows:

> In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the judges to wring their hand and say: There is nothing we can do about it.
>
> Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done, had they had the situation in mind.

[27] Of course if the phrase in s 16N(2) of the Housing Development (Control and Licensing) Act 1966 was only 'housing developer' and not 'licensed housing developer' there would not have a arisen the controversy such as we had presently here. Nonetheless, if the phrase 'licensed housing developer' was interpreted harmoniously with the wider objectives and legislative intent behind the provisions of the HDA, there was no reason, in my view, why it should not also include a 'housing developer' who was required under the law to be licensed but had failed or neglected to do so.

Such failure or neglect to apply for and be licensed when engaged in, carrying out or undertaking or causing to be undertaken housing development (as clearly discemable from the terms of the concluded sale and purchase agreement with a purchaser) should not be accepted as or be condoned by the courts as a legitimate escape route from the purview of the tribunal under s 16N(2) of the Housing Development (Control and Licensing) Act 1966. The

specific purpose of that provision was to deal with claim from purchasers/homebuyers who had a claim that they had become victims of unscrupulous 'housing developers'.

[28] It must be stressed that the tribunal was established under the HDA to deal specifically with claims lodged by a homebuyer. That was the primary source of jurisdiction of the tribunal — a claim lodged by a house buyer under s 16L of the HDA and s 16M of the HDA. In s 16A it was provided that a 'homebuyer' meant a purchaser and read together with the definition of 'purchasers' in s 3 of the HDA it was 'any person who purchased housing accommodation or …'.

This avenue for remedy, statutorily provided to a homebuyer, for a expeditious resolution of claims arising from a sale and purchase agreement entered into with persons engaged in housing development, provided claims did not exceed RM50,000 (now), should not be allowed to be defeated merely because the party involved in the housing development, by choice, was not a licensed housing developer.

[29] I was conscious and did take into consideration the fact that this controversy revolved around the extent of jurisdiction of an inferior tribunal established by statute and where the marginal note to that s 16N was 'Limitation of Jurisdiction'. However in my considered evaluation, this was not as if the establishment of the tribunal was independent of the provisions of the HDA, by a separate enabling statute that is. In such a case as the latter, perhaps, there might have been some merit in the argument that the limit of the adjudicatory powers should be strictly construed. The extent of the tribunal's powers and jurisdiction was intertwined with the objects and provisions of the HDA.

It ought not to be treated as separate and isolated from the other provisions of the HDA.

[30] Accordingly it was my view applying the principles outlined above, which called for a purposive approach to be taken by the courts in interpretation of statutory provision, and also following the instructive words of Lord Denning quoted above, that if necessary words have to be read into a statutory provision to prevent it giving rise to an absurd or unjust situation, the phrase 'licensed housing developer' would also include such persons or entities who were required to be licensed under the HDA to undertake housing development but had not done so. In this case, it would include the contractor/vendor, though 'unlicensed' under the HDA.

On this score too, it was my conclusion that the decision of the President of the tribunal to seize jurisdiction and deal with the purchaser's claim was not tainted with illegality or procedural impropriety, as was submitted by counsel for the

contractor/vendor.

SPA MUST BE CONSTRUED AS THE CONTRACT BINDING THE PARTIES AND NOT THE TERMS IN SCHEDULE G

[31] It was canvassed for the contractor/the vendor that in construing the respective rights and obligation of the parties to the SPA, the parties have to be held to be bound to the express terms set down in the SPA without any amendment or superimposition of other terms that was not mutually agreed by the parties.

The tribunal had ruled in particular that cl 2(1) of the SPA was not in compliance with and/or was in conflict with the mandatory contractual terms as provided in Schedule G Form of the contract, namely cl 23(1) and cl 25 ('the Schedule G clauses').

[32] In so far as was material for our purposes now, cl 21(1) of the SPA (Time for Handing Over Vacant Possession) provided for vacant possession of the bungalow (building) to be delivered to the purchaser within 36 calendar months from the date of the approved plan.

Schedule G cl 23(1) (Time for Delivery of Vacant Possession) stipulated that vacant possession of the building be handed to the purchaser '…within 24 calendar months from the date of this Agreement'.

[33] The tribunal applied the 'twenty four month period' for vacant possession to be handed over (as per Schedule G cl 23(1)) and the setting in of the period for liquidated damages for late delivery of vacant possession payable by the contractors/vendor was calculated to run from the expiry of the twenty four months after the date of the SPA until actual delivery of vacant possession in each of the 22 cases.

Further the defects liability period (of 18 months) (in both the SPA and Schedule G) was held to only set in after the actual delivery of vacant possession (Schedule G cl 26) respectively in each of the cases and not as stated in the SPA — cl 14.

It was the finding of the tribunal that in all the cases, the claim had been filed by the purchaser and the other 21 purchasers within 12 months of the expiry of the defects liability period in each case and this was in compliance with s 16N(2)(b) to confer jurisdiction on the tribunal to adjudicate the respective claims.

[34] Shorn of the other details and particulars, the submission of counsel for the contractor/the vendor was that the time for delivery of vacant possession of the bungalow freely contracted for under the SPA should have been upheld to

be 36 months not varied to reduce it to 24 as per the Schedule G clauses. The SPA terms, it was contended, were expressly agreed terms and were governed by the provisions of the Contracts Act 1950; the tribunal had no powers to substitute or rewrite that agreed period for vacant possession to be handed over it was submitted.

[35] The tribunal referred to the decision of the Federal Court in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31; [1982] CLJ 355 and the recent decisions of the High Court in *Lim Chon Jet @ Lim Chon Jat & Ors v Yusen Jaya Sdn Bhd* [2011] 5 MLJ 239; [2011] 8 CLJ 598 to hold that the Schedule G clause should prevail where the terms in a sale and purchase agreement between a housing developer and a purchaser was not consistent with the Schedule G clauses.

The Court of Appeal in *Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd and another apeal* [2013] 2 MLJ 361; [2011] 4 CLJ 42 had occasion to comment on the significance of the Schedule G clauses in the following helpful analysis of the foundational basis for strict compliance with the Regulation and of the terms in Schedule G:

> Section 24 of the Act confers on the Minister the power to make regulations for the purpose of carrying into effect the provisions of the Act. (Pursuant thereto, the Housing Development (control and Licensing) Regulations 1989 were brought into existence. Regulation 11 thereof expressly provides for the standard form of contract of sale. It reads:-
>
> 11 Contract of sale
>
> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the sub divisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.
>
> A plain reading of the mandatory provisions contained in reg. 11 reveals that it provides for two categories of the standard statutory sale and purchase agreement. The sale and purchase agreement for housing accommodation together with the sub divisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G. In the case of subdivided building, it shall be in Schedule H. The parties thereto are not permitted to contract out of its. As a general rule, compliance with these statutory contracts of sale is mandatory; an exception arises only with the approval of the Controller of Housing, in the form of a certificate in writing, in order to waive or modify the provisions thereof.

[36] After having had held that the contractor/the vendor were housing developer engaged in housing development (and rightfully so, as I have discussed above) the tribunal was not therefore in error to hold that the Regulation and its mandatory provisions applied to the contractor/the vendor.

The 'handing over of vacant possession' clause allowing 36 months from date of approved plan was in direct contravention of the Schedule G clauses relating to 'delivery of vacant possession' of the completed bungalow. The contractor/the vendor could not and ought not to be allowed to contract out or circumvent that Schedule G clause.

The operative terms as between the parties to the SPA in so far as 'Time for delivery of vacant possession' applicable in the circumstances was the Schedule G cl 23.

This was within the law and the tribunal could not be faulted for being irrational either.

CONCLUSION

[37] The court in dealing with a judicial review application was not sitting in appeal against the impugned decision or award but only exercising the court's supervisory powers over subordinate tribunals. To merit curial intervention the applicant concerned had to establish that 'errors' in the nature of 'illegality', 'irrationality' or 'procedural impropriety' (and maybe 'proportionality') had been committed during the decision making process. (*R Rama Chandran v The Industrial Court of Malaya & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 (FC); *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748 (CA); *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629; *Sheila a/p Sangar v Proton Edar Sdn Bhd & Anor* [2009] 4 MLJ 285; [2009] 8 CLJ 200 — Mohamed Arif JC; and *Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor* [2007] 1 MLJ 626; [2007] 1 CLJ 300).

[38] The judicial review court's intervention on the grounds of 'illegality' would be available if it was shown that the decision maker had misconstrued any provision of a statute or misapplied a principle of general law. A decision could be quashed on the basis of 'irrationality' if it was shown that there was no basis to support the finding of fact, or the conclusion reached was diametrically contrary to evidence on record or where the decision maker had asked the wrong questions or taken into consideration irrelevant matters and omitted relevant matters.

[39] In my evaluation of the material before me, and as discussed above, the decision and award of the tribunal was not tainted by any illegality, irrationality or procedural impropriety.

[40] The application was therefore dismissed with costs.

Application dismissed with costs.

Reported by Kohila Nesan